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No. 86-546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* and BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 7, 1986

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the Edison Electric Institute ("EEI") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

SPECIAL INTEREST OF THE EDISON ELECTRIC INSTITUTE

EEI's members are investor-owned electric utilities that generate, transmit and sell electricity at wholesale and at retail throughout the nation. These services are made

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[1] EEI has obtained consent to file this brief from the petitioner. The letter granting consent has been filed with the Clerk of the Court. The respondents have not consented to EEI's participation.

available to customers via power supply and distribution arrangements that cross state lines, creating a nationwide power system that requires uniform and predictable regulation.

At issue in this case are matters of urgent concern to virtually every member system of EEI, almost all of whom participate in one or more forms of interstate transactions, incurring costs pursuant to federally-approved rates. When those costs are scrutinized by state utility commissions with results at variance with federal regulation, costs are then "trapped" between federal and state or local regulation. A utility so stricken does not suffer in isolation. Its own ratepayers will, in the long run, suffer, as will its employees, its investors, its affiliates and subsidiaries, and its generation and transmission project co-owners.

All utilities have a stake in the availability of the federal district courts for the arbitration of federal preemption issues. Every electric utility company faces the potential conflict between federal and state regulation of contracts and rates that is an inevitable result of our system of dual regulation and interstate power arrangements. Because so many utilities are now involved in interstate transactions, the industry can be adversely affected by a single local regulatory body whose actions in one state can unjustifiably threaten billions of dollars invested in other states.

This clash between two regulators will arise in many factual situations, some similar to and others differing from the one that the petitioner is now presenting to the Court. As utilities become more deeply involved in interstate arrangements, the same question of the scope of the Federal Energy Regulatory Commission's plenary jurisdiction over such transactions will arise—as will the question of whether and if so, when, a federal district court should abstain from deciding that question on the

merits. EEI's members have a vital interest in this Court's evaluation of the interplay between federal and state interests in public utility regulation that goes beyond the specific factual issue presented by the petitioner.

EEI believes that it can provide insight as to the national scope of the concerns at issue in this case. The attached brief as *amicus curiae* demonstrates the significance of these issues to all of EEI's members.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EEI respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE

The members of Edison Electric Institute ("EEI") are investor-owned electric utility companies supplying electric service to individuals, industries and businesses throughout the United States. EEI's members serve approximately 96 percent of all customers of investor-owned utilities and 73 percent of this country's power consumers.

This nation's growing electric needs are increasingly met by arrangements that involve utility companies operating in more than one state: power pools; coordina-

tion, exchange and interconnection arrangements; and transactions like that at issue here: affiliated utilities in different states that share in the costs and output of a generation facility. Not only does this arrangement meet generation needs where an individual company lacks sufficient resources to finance a plant on its own, but it also permits risk-spreading and economies of scale, thus meeting the nation's electric needs by the most economic means possible.

Because these arrangements usually involve several states, uniform regulation of interstate transmission and wholesale transactions is required. The passage of the Federal Power Act ("FPA"), with its grant of exclusive jurisdiction to the Federal Energy Regulatory Commission ("FERC") over these areas, is the clearest evidence possible of this strong federal interest in uniform regulation. It can be expected that each state will promote the lowest retail electric rates possible for its own residents and businesses. The conflict between state and federal regulation that inevitably emerges from these attempts disrupts utilities' efforts to provide least-cost and reliable energy to power consumers in more than one state. This conflict poses a clear threat to the continued development of national energy resources.

The repercussions of this conflict are vividly illustrated by the phenomenon of "trapped costs." As the petitioner, New Orleans Public Service Inc. ("Public Service") points out, in August of 1985, it began to incur approximately $15 million in "trapped costs" each month, a sum which exceeds a typical year's earnings for Public Service. Pet. at 4 n.4. This $15 million represents costs that the FERC directed Public Service to bear at the wholesale level as its share of the cost of Grand Gulf Unit No. 1.[1] When a state ratemaking body fails to

[1] An affiliate of Public Service, System Energy Resources, Inc., owns 90 percent of Grand Gulf 1. *See* Pet at 3 n.3. At issue before the FERC were the allocations of that 90 percent share among the

provide the utility recognition of these costs in retail rates, the state body achieves its parochial goal—lower retail rates for its own ratepayers—but FERC's actions and goals are undermined. Only a federal arbiter possesses the requisite jurisdiction and national perspective to assure uniform and fair oversight of these conflicts.

Federal court abstention intensifies and prolongs the crises precipitated by "trapped costs" in denying the strapped utility a prompt and fair resolution of the dispute in the appropriate federal forum. The delay that abstention creates can prove disastrous for a utility, both financially and operationally, while encouraging the state's recalcitrance. Even though this Court has provided a clear resolution of the underlying issue of preemption in *Nantahala*,[2] the crisis precipitated in this field will continue unabated until the corollary abstention question is resolved. This Term, the *AEP* case presented the Court with the same core question of abstention in the face of a preemption claim under the FPA. *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, No. 85-5121, slip op. (6th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49) *order requesting Solicitor General's views*, 55 U.S.L.W. 3231 (U.S. October 6, 1986) ("*AEP*").[3]

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four operating subsidiaries of the Middle South system, including Public Service. As the petitioner points out, at a later time Public Service and the Council reached a conditional partial settlement. That settlement provided for partial retail rate recovery of some of the FERC-allocated costs. Under that settlement, however, the Council reserved its "right" to reduce the level of FERC-mandated costs recognized in Public Service's retail rates in a prudence inquiry. *See* Pet. at n.7.

[2] *Nantahala Power & Light Co. v. Thornburg*, —— U.S. ——, 106 S. Ct. 2349 (1986) ("*Nantahala*").

[3] EEI has also participated in both the *Nantahala* and *AEP* proceedings as an *amicus curiae*.

STATEMENT OF THE CASE

EEI adopts the petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS YET ANOTHER IN AN ALARMING TREND OF CASES WHERE THE LOWER FEDERAL COURTS ARE ABDICATING THEIR PROPER ROLES.

EEI's prediction to this Court in its *amicus* brief in *AEP* (at 4-5) is already coming true—controversies involving the same array of *Nantahala* issues are again and again being deflected to this Court for resolution, when they are more properly addressed at the federal district court level. Together with *Nantahala* and *AEP*, this is now the third time in two years that a "trapped costs" case has come up to this Court following a federal district court's decision to abstain. This Court should instruct the lower tribunals that they can, and should, adjudicate *Nantahala* cases that are properly before them.

The Fifth Circuit's suggestion that abstention does not "foreclose" review of Public Service's preemption claim by the Supreme Court (Pet. App. at A-20) reveals a profound misunderstanding of the Supreme Court's role in addressing this federal question. Having resolved the underlying legal question in *Nantahala*, this Court should not be called upon to apply it to each new set of facts arising under that question, as the Fifth Circuit's logic would entail. This is precisely the role that the district courts are designed to play. The fact that *AEP*, *Nantahala*, and now the case below, all came so recently before this Court illustrates how abstention by a federal district court has kept clear-cut cases of federal preemption from being decided in a consistent and prompt manner, and in the most efficient forum.

II. THE CONFUSION BOTH AMONG AND WITHIN CIRCUITS IN THIS AREA OF LAW IS INCREASING AND REQUIRES RESOLUTION.

The Fifth Circuit's curious reversal of its prior determination in the same case is exemplary of the confusion that exists on this matter. The split among the circuits at the time of AEP's petition for certiorari in July of this year has intensified. At that time, the Sixth and Fourth Circuits[4] had condoned abstention in the face of a preemption claim under the FPA or its analogue, the Natural Gas Act, while the Third, Fifth, and Eighth Circuits had not.[5] The Fourth Circuit subsequently affirmed a district court's injunction of a state ratemaking order in *Appalachian Power*.[6] The Sixth Circuit displayed profound internal confusion as to the particular strand of abstention doctrine that it considered applicable in its *AEP* decision. No single judge in the three-judge panel in that case was able to agree with the others as to the appropriate analysis.

Even more notable here is the fact that the split among the circuits has resulted in contrary results for two members of the same holding company system. *Compare* the

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[4] *AEP; Aluminum Co. of America v. Utilities Comm'n of N.C.*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

[5] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986); *New Orleans Public Service Inc. v. New Orleans*, 782 F.2d 1236, *modified*, 798 F.2d 858 (5th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3295 (U.S. October 3, 1986) (No. 86-546); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 884 (1986).

[6] *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W.Va.), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D. W.Va. 1986).

case below (Pet. App. at A-14 - A-24) with *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 593 F. Supp. 363 (E.D. Ark. 1984), *aff'd*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 884 (1986). That such conflicting results should occur for affiliated utilities on questions arising out of the same transaction, merely because of geographical happenstance, signals that abstention here is thwarting the doctrine's intent by creating confusion, and not avoiding it. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) ("*Burford*").

III. CERTIORARI IS NECESSARY TO CORRECT THE FIFTH CIRCUIT'S MISAPPLICATION OF *NANTAHALA*.

The Fifth Circuit's decision to abstain from adjudicating a FPA preemption claim creates a dangerous and anomalous precedent: under the Fifth Circuit's reasoning, when a federal statute expressly reserves to the states an area in which they have the power to regulate but otherwise preempts state action, a federal district court is foreclosed from ever determining the precise scope of jurisdiction that Congress intended to leave to the states. This precedent is even more dangerous for the way in which this Court's *Nantahala* decision is misused to rationalize the result.

A. The Case Below Fell Clearly Within the Ambit of *Nantahala*.

The merits of the federal question presented in the case below are unquestionably controlled by *Nantahala*. In that case, this Court clearly articulated the boundary where state retail ratemaking leaves off, and federal oversight begins:

> FERC clearly has exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers. See 16 U.S.C. § 824(b); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340

> . . . (1982). Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must rather give effect to Congress's desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

106 S. Ct. at 2357.

If anything, the preemption issue in the case below is even more readily apparent than in *Nantahala*, where the manner in which FERC had set the "rate" and cost allocation was more complicated. *Nantahala*, 106 S. Ct. at 2352-53. Here, it is crystal clear: in Opinion No. 234, FERC unambiguously modified the cost, capacity and energy allocations in the filed unit power sales agreement for Grand Gulf Unit No. 1 and directly ordered Public Service to pay 17 percent of the costs for Grand Gulf Unit No. 1.[7] Once FERC set that cost allocation, Public Service had no choice but to pay it, or risk violating FERC's order.

Given the large sums involved, Public Service could not afford to absorb those costs, even for a brief period, and it promptly filed with the Council for recognition of those costs in its retail rates. As a matter of federal law, the Council was required to recognize the costs as legitimate operating expenses in Public Service's rates; the failure to do so would render them "trapped costs." The Council, however, refused to grant Public Service rate relief reflecting the FERC-approved operating expense,[8] in direct contravention of the FPA.[9]

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[7] The Council had actively participated in the FERC proceeding. There it unsuccessfully argued that Public Service should be allocated a lower level of costs. *See* Pet. at 3.

[8] As noted above, the Council and Public Service have reached a conditional partial settlement relative to this dispute, but the full, timely recognition of the FERC-mandated expenses has not been forthcoming from the Council. *See* note 1, *supra*.

[9] *See Nantahala*, 106 S. Ct. at 2357, quoted *supra* at pp. 6-7.

B. The Fifth Circuit Misconstrued and Confused the Interplay Between Preemption Doctrine and Abstention Doctrine.

The Fifth Circuit did not ignore the *Nantahala* decision, but certainly gave it an unusual twist. Conceding that abstention in the face of a preemption claim is "problematical," Pet. App. at A-15, the Fifth Circuit nevertheless relied on *Nantahala* for the proposition that "local control over retail rate making is not preempted by federal law." Pet. App. at A-16. The court then reasoned: "The structure of the Federal Power Act, preserving as it does state jurisdiction over retail rates, suggests that these local institutions should normally proceed unfettered by federal interference." Pet. App. at A-17.

As a rationale for abstention, this reasoning begs the question: while it is true, as *Nantahala* noted, that states retain local control over retail rates, the very question at issue here is whether that is what the Council is properly controlling. Where local institutions like the Council wield their control over retail ratemaking in a fashion that interferes with FERC's exclusive jurisdiction over interstate wholesale rates, they are engaging in wholesale, not retail, ratemaking and in the regulation of interstate commerce. In these cases, it is the *federal* domain that is improperly subjected to state interference. The "bright line" between federal and state rate regulation that this Court affirmed and strengthened by its decision in *Nantahala* [10] thus counsels against abstention, not for it. The precedent set in the opinion below would turn both *Nantahala* and the FPA on their heads.

Indeed, the Fifth Circuit has departed from its own prior position on this point. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744

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[10] 106 S. Ct. at 2356-57, *quoting FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964).

F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds*, —— U.S. ——, 106 S. Ct. 2884 (1986) (*"South Central"*), the Fifth Circuit affirmed a decision not to abstain where "the claim presented . . . is predicated upon a naked exercise of the federal preemption power." In its first decision below, the Fifth Circuit cited this precedent with approval. Pet. App. at A-13.

Other circuits have honored this same reasoning. In *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206, 212 n.1 (9th Cir. 1980) (*"IBEW"*), the Ninth Circuit explained:

> A preemption claim alleges in essence that Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions. If a preemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate.[11]

In reversing its first decision below, the Fifth Circuit failed to address its own conflicting precedent in *South Central*, but denounced the reasoning of the *IBEW* case as "unnecessary dictum." The court feebly attempted to distinguish *IBEW* on the grounds that the case did not involve the FPA, a statute that expressly reserves to the states some local authority. Pet. App. at A-20 - A-21. The FPA is not unique, however, in reserving an area of regulation to the states.[12] For example, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-12 (1982 & Supp. III 1985) ("HMTA"), regulates interstate transportation of hazardous materials. As with the FPA, the HMTA allows certain authority to remain with the states. Section 1811, 49 U.S.C. § 1811 (1982).

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[11] *Accord, Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 373, 377 (9th Cir. 1982); *Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983).

[12] Even in the absence of express statutory reservation, the Constitution reserves some authority to the states. U.S. Const. amend. X.

This fact, however, has not prevented a federal district court from adjudicating a preemption challenge to state regulation of hazardous materials transportation. *See, e.g., National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983). *See also, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 489 F. Supp. 699 (E.D. Cal. 1980), *rev'd on other grounds*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983); *Pacific Legal Found. v. State Energy Resources Conservation and Dev. Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979), *rev'd on other grounds*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983) (decided under Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1982 & Supp. III 1985)). Conspicuous by its absence from these cases is any discussion of the possible applicability of abstention doctrine.

To abstain under either *Burford* or *Younger*[13] is to decide that the state interests at issue outweigh whatever federal interests exist. In essence, then, the Fifth Circuit's decision to abstain prejudged the preemption question, and in so doing, eviscerated the *Nantahala* doctrine before it was even heard on the merits. *See, e.g., IBEW*, 614 F.2d at 212 n.1 ("[A] court cannot abstain under *Burford* in a preemption case without implicitly ruling on the merits of the action."). Certiorari is necessary to correct this misuse of a principle so recently established by this Court.

IV. THE FIFTH CIRCUIT EMPLOYED BOTH *YOUNGER* AND *BURFORD* ABSTENTION IN A MANNER AT ODDS WITH THIS COURT'S ENUNCIATION OF THOSE DOCTRINES.

Both the *Younger* and *Burford* strands of abstention are driven by a desire to avoid needless federal interference with legitimate state-created interests and proceedings. This core policy must be reconciled, however,

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[13] *Younger v. Harris*, 401 U.S. 37 (1971).

with the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citations omitted) ("*Colorado River*"). Abstention doctrine should not apply to remove from federal district courts cases properly before them that deserve, by virtue of their overwhelmingly federal nature, federal district court adjudication. Abstention is only appropriate where the matter can with certainty be satisfactorily and fully resolved in the state forum, and only in those "exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959), *cited in Colorado River*, 424 U.S. at 813. Because the case below presents an archetypical federal question—preemption—no such countervailing interest exists, and there is no assurance of adequate redress within the state system.

A. *Burford* Abstention Is Inappropriate Where the State Has Invaded the Federal Regulatory Domain.

The Fifth Circuit relied on *Burford* and *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951) ("*Alabama*") to justify abstention in the face of a preemption claim under the FPA. The strand of abstention doctrine in *Burford* and its progeny, however, is misplaced where there exist both a federal and state scheme of regulation of the same subject matter, and a sharp division between the two.

Burford abstention is designed to protect a state's legitimate interests in creating and administering a coherent state-wide regulatory scheme. *Burford*, 319 U.S. at 332-34. Its applicability presupposes local facts, state law or policy questions, and an expert state body skilled at construing the state-specific facts at issue. *Id.* More fundamentally, it presupposes a situation in which the

state is the exclusive regulator. These underlying prerequisites for *Burford* abstention are lacking here.

In *Burford*, the federal attack on the validity of a state order granting permission to drill oil wells was based on diversity of citizenship and a due process claim. *Burford*, 319 U.S. at 317. No federal statutory scheme governed the issue before the court, and no preemption claim existed. *Id.* at 319. Similarly, in *Alabama*, a railroad company challenged an order of the state railroad commission based on diversity and a confiscation claim. *Alabama*, 341 U.S. at 342-43. The Court specifically stated that the Interstate Commerce Commission lacked jurisdiction over the subject matter at hand. *Id.* at 346 n.7.

Under those circumstances, abstention to prevent federal interference with the state's exclusive regulatory scheme may have been appropriate. But where Congress has created a federal regulatory scheme, with a carefully-drawn "bright line" between state and federal interests, abstention undermines Congress' preemptive intent. The Fifth Circuit's abstention decision effectively frustrates the application of the superior interests of the FERC enunciated by this Court in *Nantahala*.[14]

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[14] Ironically, the Fifth Circuit also relied on language in *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) ("*Lewis*") for the proposition that abstention is proper when the federal interest "touches some overriding state interest." Pet. App. at A-19. Whatever value these words may carry as *dictum* is doubtful, inasmuch as the holding in *Lewis* was against abstention. The court rejected *Burford* abstention because the appellants had attacked but one section of a large and fairly complex state regulatory scheme. Invalidation of that one aspect would scarcely disrupt the state's system of regulation. *Lewis*, 559 F.2d at 955. As in *Lewis*, requiring the Council in a single rate proceeding to recognize FERC-approved costs for one portion of one utility's cost of service is hardly an attack on the Council's authority to set just and reasonable retail rates.

B. *Younger* Doctrine Is Not Intended to Assist States in Thwarting Federal Regulation of Wholesale Ratemaking.

Younger abstention doctrine emerged from the context of a federal action to enjoin a state's prosecution of state criminal violations. *Younger*, 401 U.S. at 40. It is premised on "a proper respect for state functions." *Id.* at 44.

Subsequent decisions have extended *Younger* somewhat to civil proceedings where important state interests are involved and to administrative proceedings "judicial in nature" in which important state interests are vindicated, so long as the federal plaintiff is afforded a full and fair opportunity in the state proceeding to litigate his constitutional claim. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-34 (1982); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, —— U.S. ——, 106 S. Ct. 2718, 2723 (1986) (*"Ohio Commission"*).

There are no state interests at issue in the case below, however, sufficient to bring it within *Younger*'s scope. The only question is whether the Council must recognize a FERC-approved cost allocation in setting retail rates. That question is answered by federal law.

The Fifth Circuit nevertheless reasoned:

> The interest of the Council of New Orleans in setting retail rates is clearly important here: indeed, jurisdiction over retail rates is preserved to the states by the terms of the Federal Power Act.

Pet. App. at A-23 - A-24. That the FPA reserves to the states the power to set retail rates is irrelevant. Retail ratemaking is not the type of state interest protected by *Younger*, as even a cursory reading of this Court's

seminal *Younger* doctrine cases reveals.[15] *See Ohio Commission*, 106 S. Ct. at 2723 and cases cited therein, all of which involve the state's interest in exercising its enforcement powers to protect its citizens' health, safety and morals.[16]

Even if retail ratemaking were considered to be within the *Younger* category of interests, the critical fact here is that the state has forayed beyond the "retail" boundary, and engaged in regulation of wholesale rates in interstate commerce. No state has a legitimate, much less an important, local interest in the purposeful disobedience of federal law and policy.

Moreover, the delay that abstention entails negates any "full and fair opportunity" to litigate a preemption claim in the state courts. *See id.* at 2723. The result of abstention here is the "opportunity" for Public Service to lose, permanently, up to $15 million every month, while a clear federal question involving neither state law nor state policy is ignored by a recalcitrant local body dissatisfied by FERC's rulings.[17]

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[15] Even if retail ratemaking were, *arguendo*, protected under *Younger*, the simple recognition of the FERC-allocated costs would not interfere with ratemaking functions not controlled by federal law.

[16] As the petitioner points out, ratemaking is not the "judicial" category of proceeding that one encounters in the *Younger* line of enforcement cases. Pet. at 14 & n.16. This Court's most recent case applying *Younger* doctrine expressly noted that where a proceeding is not "judicial in nature", abstention may not be appropriate. *Ohio Commission*, 106 S. Ct. at 2723 n.2, *citing Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-39 (1984).

[17] The U.S. Court of Appeals for the D.C. Circuit recently explained:

> [T]he need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts, however, is . . . problematical. This extension

There are, in addition, exceptions to *Younger* that the Fifth Circuit should have recognized and applied. For example, *Younger* abstention is not appropriate when the action in question poses a threat of "irreparable injury." The Fifth Circuit's suggestion that review might be had eventually in the Supreme Court ignores the great financial distress that Public Service suffers while its preemption claim slowly "wind[s] its way up through the state courts." Pet. App. at A-20. The Fifth Circuit's cavalier belief that these long, expensive delays are acceptable is shockingly insensitive to the realities facing Public Service and the utility industry in general.

The Court in *Younger* also pointed out that abstention is inappropriate where a state statute is patently invalid on its face. *See Younger*, 401 U.S. at 53-54. The state action complained of by the petitioner here patently violates the Supremacy Clause. Given this Court's holding in *Nantahala*, the clear-cut nature of FERC's order, and the flat refusal of the Council to honor it, the Council's action is not protected against federal intervention by *Younger*. The Fifth Circuit halted its analysis, however, before it even reached this question.

V. THE FIFTH CIRCUIT'S DECISION TO ABSTAIN CONFLICTS WITH ITS EARLIER, CORRECT DECISION UNDER THE JOHNSON ACT.

In its earlier decision, the Fifth Circuit properly held that the Johnson Act, 28 U.S.C. § 1342 (1982), did not bar federal district court review, because Public Service presented a preemption claim. Pet. App. at A-12. This was a proper ruling and consistent with the court's prior decision that abstention was not appropriate.

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would make federal courts cinderellas to their sister state courts in adjudicating federal constitutional rights, their native area of competence and jurisdiction.

Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 702 (D.C. Cir. 1984).

The Johnson Act cannot be understood as anything but a codification of judge-made abstention doctrine in utility rate cases. Its legislative history indicates that it was designed to prevent undue federal court interference with those aspects of state ratemaking that are purely local. *See* 80 Cong. Rec. 1916, 1916-18 (Feb. 5, 1934). Because federal district courts had been engaging in *de novo* rate hearings on appeal of state rate orders, they frequently substituted their own judgments for those of the local administrative bodies that already had held hearings on these local issues. *Id.* at 1916. The Johnson Act was designed to restrict this sort of direct federal interference in local ratemaking. The Act specifically exempts, however, federal cases presenting preemption claims. The implication of this specification is that, because of the overwhelmingly federal nature of a preemption claim, the case is in fact best suited for adjudication in a federal district court.

Hence, there is an evident lack of logic in the Fifth Circuit's belief that abstention is particularly appropriate when the claim is preemption under the FPA. Its assertion cannot be reconciled with the Johnson Act's purpose and operation. The conflicting nature of these rulings indicates how far amiss the Fifth Circuit's abstention decision has gone.

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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